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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KATIE and LORIE ITTNER et al., Plaintiffs and Appellants, v. MERCURY INSURANCE COMPANY, Defendant and Respondent.	B185111 (Los Angeles County Super. Ct. No. BC323885)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

The Quisenberry Law Firm, John N. Quisenberry, Heather M. McKeon and Eric L. Brown for Plaintiffs and Appellants.

Horvitz & Levy, Lisa Perrochet, Bradley S. Pauley and Patricia Lofton; Gordon & Rees, Theresa A. Kristovich and David M. Morrow for Defendant and Respondent.

The declarations page of an automobile insurance policy indicated a 30-day maximum benefit for rental car coverage. The insurance policy itself provided that the rental car benefit would be paid from the day the loss was reported through the day the insurance company made a settlement offer. Plaintiff insureds were in an automobile accident and reported the loss to defendant insurer. The insurer made a settlement offer, which terminated the rental car benefits prior to the expiration of 30 days. Plaintiffs were therefore required to pay the remainder of their rental car expenses. Plaintiffs brought suit, alleging breach of contract and fraud. They argued that the declarations page of the policy led them to reasonably expect a full 30 days of rental car coverage and that the provision in the policy terminating benefits upon a settlement offer was ineffective as it was not conspicuous, plain and clear. Alternatively, they argued that the declarations page and the limiting provision in the policy together created an ambiguity, which must be resolved in favor of coverage. The trial court sustained the insurer's demurrer without leave to amend. We conclude that the policy provision regarding the termination of rental car benefits is conspicuous, plain and clear. We also conclude that there is no ambiguity. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Lori and Katie Ittner (mother and daughter) obtained automobile insurance from defendant Mercury Insurance Company ("Mercury"). They purchased an insurance policy which provided liability, comprehensive and collision insurance, among other benefits. The policy also provided a "Rental Car Benefit," which covered "the expense incurred for the rental of an automobile from a public automobile rental

agency" when a covered comprehensive or collision loss occurred to a covered automobile.

According to the declarations page of plaintiffs' policy, the "LIMITS OF LIABILITY" for the rental car benefit coverage were "$40 per day 30 days" (hereafter referred to as the "Declaration Provision").[1] The declarations page also states, "Coverage/Limits are subject to all policy terms." The complete policy terms were listed in a 17-page policy booklet.[2] Under the bold, capitalized topic-heading "**PHYSICAL DAMAGE**," the policy itemizes, "**Coverage F – Rental Car Benefit**," in a subheading that is also in bold type. That coverage provides, in pertinent part[3] (with original formatting preserved):

> "(a) If a covered comprehensive or collision loss, in excess of the applicable deductible, occurs to an owned automobile, the company will pay for expense incurred for the rental of an automobile from a public automobile rental agency. The maximum daily rate and the

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[1] In their brief on appeal, plaintiffs state that the declarations page states " '. . .Coverages: Rental Car Benefits $40 per day 30 days.' " This is incorrect. The declarations page contains a three-column chart. The first column is labeled "COVERAGES"; the second is labeled "LIMITS OF LIABILITY"; and the third is labeled "PREMIUMS." On the row in which "RENTAL CAR BENEFIT" appears in the "COVERAGES" column, "$40 per day 30 days" appears in the "LIMITS OF LIABILITY" column. In other words "$40 per day 30 days" is not identified as a "Coverage[]," as plaintiffs assert, but rather as the "Limits of Liability" of the rental car benefit coverage.

[2] Plaintiffs characterize the policy booklet as a "handbook." The booklet is attached to plaintiffs' first amended complaint. It is simply a booklet titled "Policy Provisions."

[3] The coverage also includes inapplicable provisions relating to the theft of the entire automobile.

> maximum covered days are each limited as specified in the policy declaration. Reimbursement will be for the period beginning 12:01 A.M. on the day following:
>
> Losses Other Than Theft of the Entire Automobile
>
> (1) The day the owned automobile is delivered to a garage for repairs after repairs have been authorized by the named insured and the company and terminating on 12:01 A.M. on the day following completion of repairs or
>
> (2) The day the loss is reported to the company if the company offers settlement in lieu of repairs and terminating on 12:01 A.M. on the day following the settlement offer."

(Subdivisions (1) and (2) hereafter referred to as the "Policy Provision.")

On April 9, 2004, plaintiff Katie Ittner was involved in an automobile accident, resulting in damage to her covered automobile. Mercury characterized the accident as a covered loss. On April 30, 2004, Mercury made Katie Ittner a settlement offer, which resulted in the termination of Katie Ittner's rental car benefits, according to the terms of the Policy Provision. The settlement check was subsequently issued on May 24, 2004.[4]

On November 1, 2004, plaintiffs brought the instant action against Mercury. Plaintiffs alleged a class action on behalf of the purported class of all of Mercury's insureds within the previous five years who had been "promised, warranted and represented" in the Declaration Provision that they would receive 30 days of rental car

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[4] In their brief on appeal, plaintiffs explain that Katie Ittner's car was irreparable and that they could not afford to purchase a replacement car until they had received full payment from Mercury. Plaintiffs cite to the entirety of their first amended complaint for these facts, but the facts do not appear in that pleading.

coverage, but who were subsequently denied the full 30 days of benefits when Mercury made a settlement offer prior to the expiration of the 30-day period. Plaintiffs alleged causes of action for injunction, breach of contract, bad faith, unfair competition (Bus. & Prof. Code, § 17200), negligent misrepresentation, and fraud. The gravamen of plaintiffs' complaint was that: (1) Mercury had promised its customers, either by representation or the Declaration Provision, that they would receive a full 30 days of rental car benefits should their cars be inoperable as the result of covered accidents; (2) Mercury had "discreetly" hidden in its policies the Policy Provision, which terminated the rental car benefits upon Mercury's act of making a settlement offer, regardless of how long the car actually remained inoperable; and (3) Mercury prematurely made settlement offers in order to terminate rental car benefits as soon as possible, although it did not pay its insureds the settlement amounts for some time thereafter.[5]

Mercury demurred, arguing that the Policy Provision was conspicuous, plain, clear, and unambiguous. Mercury also argued that plaintiffs had failed to plead fraud with particularity, and that, in any event, plaintiffs could not establish *justifiable*

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[5] While this was the heart of plaintiffs' complaint, they also alleged that Mercury had made them a "less than adequate offer." Plaintiffs subsequently explained that they "do not dispute [Mercury's] adjustment of the claim." It appears that plaintiffs only contend the offer was inadequate to the extent that it did not include sufficient funds for 30 days of rental car benefits.

reliance as a matter of law.[6] The demurrer was sustained with leave to amend, and plaintiffs filed a first amended complaint. The first amended complaint eliminated the cause of action for injunctive relief, and otherwise was substantially similar to plaintiffs' initial complaint. Mercury again demurred, raising the same grounds. The trial court sustained the demurrer without leave to amend. Plaintiffs filed a timely notice of appeal.

CONTENTIONS ON APPEAL

On appeal, plaintiffs pursue only their causes of action for breach of contract, negligent misrepresentation, and fraud. As to breach of contract, plaintiffs argue that Mercury could not rely on the Policy Provision because that provision was not conspicuous, plain and clear. Alternatively, plaintiffs argue that the Policy Provision, when read in connection with the Declaration Provision, created an ambiguity which must be construed in favor of coverage. As to the causes of action for negligent misrepresentation and fraud, plaintiffs assert that they pleaded fraud with particularity and that they properly alleged justifiable reliance on the representations of a full 30 days of rental car benefit coverage.[7] We disagree on all points.

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[6] Mercury also argued the entire action was barred as plaintiffs had failed to exhaust the mandatory arbitration remedy provided in the policy. Yet the policy explicitly states that this remedy applies to "Coverages D, E and L," while the rental car benefit at issue in this case is Coverage F.

[7] Plaintiffs also argue that their class action allegations are sufficient. As we conclude plaintiffs state no viable cause of action, the class action issue is moot.

DISCUSSION

1. *Standard of Review*

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.) "[F]acts appearing in exhibits attached to the complaint . . . , if contrary to the allegations in the pleading, will be given precedence." (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.)

2. *Principles of Insurance Policy Interpretation*

" '[I]nterpretation of an insurance policy is a question of law.' [Citation.] 'While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.' [Citation.] Thus, 'the mutual intention of the parties at the time the contract is formed governs interpretation.' [Citation.] If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] If the policy language 'is clear and explicit, it governs.' " (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.)

3. *The Policy Provision is Conspicuous, Plain and Clear*

"In the insurance context, 'we begin with the fundamental principle that an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again, "any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect." ' " (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204.) It is true that an insured has the duty to read the policy and will therefore be bound by clear and conspicuous policy provisions even if the insured does not read it. (*Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, 1586.) However, this rule is insufficient to bind a party to "unusual or unfair language unless it is brought to the attention of the party and explained." (*Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570, 578.) "[T]o be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.' [Citation.] Thus, any such limitation must be placed and printed so that it will

attract the reader's attention. Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson. [Citations.] The burden of making coverage exceptions and limitations conspicuous, plain and clear rests with the insurer." (*Haynes v. Farmers Ins. Exchange, supra*, 32 Cal.4th at p. 1204)

The rule that exclusionary language must be conspicuous, plain and clear applies only when the insured has a reasonable expectation of coverage. (*Haynes v. Farmers Ins. Exchange, supra,* 32 Cal.4th at p. 1213.) Once an insured has a reasonable expectation of coverage, the court then must consider whether the limitation on that coverage is conspicuous. "'Courts have invalidated exclusions under the conspicuous requirement where (1) they are not included under the exclusion section and are placed on an overcrowded page; (2) they are included in a 'General Limitations' section but in a dense pack format; or (3) they are hidden in fine print in a policy section bearing no relationship to the insuring clause.' " (*Zubia v. Farmer Ins. Exchange* (1993) 14 Cal.App.4th 790, 795.) An exclusionary provision is not inconspicuous simply because the provision and its subheading are printed in the same typeface as other provisions and subheadings. (*Id*. at pp. 795-796.) Nor is an exclusion inconspicuous merely because it does not appear on the declarations page.[8] (*Merrill & Seeley, Inc. v.*

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[8] In plaintiffs' opening brief on appeal, they suggest the Supreme Court's opinion in *Haynes v. Farmers Ins. Exchange, supra,* 32 Cal.4th at p. 1205 held that a party may not rely on language in the main body of the policy to limit coverage. This is incorrect. The Supreme Court in that case simply held that the insurer could not rely on *particular* language in the main body of *its* policy, because *that* language was not conspicuous,

Admiral Ins. Co. (1990) 225 Cal.App.3d 624, 631.) The issue, instead, is whether the entire policy adequately directs the reader to the terms of the relevant exclusionary language. (*Haynes v. Farmers Ins. Exchange, supra,* 32 Cal.App.4th at p. 1210)

Once the provision has been determined to be conspicuous, the provision must also be plain and clear in order to be given effect. " ' "This means more than the traditional requirement that contract terms be 'unambiguous.' Precision is not enough. Understandability is also required." ' " (*Haynes v. Farmers Ins. Exchange, supra,* 32 Cal.4th at p. 1211.)

We turn now to the Policy Provision at issue in this case, which terminates rental car benefit payments after a settlement offer is made. Before considering whether the Policy Provision is conspicuous, plain and clear, we must consider whether it limits coverage the insureds reasonably expect. Plaintiffs contend that it does, because they reasonably expected a full 30 days of rental car benefits because of the Declaration Provision. Plaintiffs consider the Declaration Provision *standing alone*, without regard to the terms of the policy or, indeed, the other terms on the declarations page which qualify the language on which plaintiffs rely. In context, the declaration page clearly states that 30 days of rental benefit coverage is the "LIMIT[] OF LIABILITY" and that "Coverage/Limits are subject to all policy terms." It would not be reasonable for an insured to expect a full 30 days of rental car benefits without reviewing the referenced policy terms that might restrict that benefit. Indeed, the declarations page also provides

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plain and clear – as it was a limitation on permissive user coverage that was buried in a passage titled "Other Insurance." (*Ibid.*)

a limit of liability of $25,000 for "bodily injury liability" for "each person." But no reasonable insured would interpret this to mean *any* injured party is entitled to the *full* $25,000 without regard to *any* terms in the policy. The same is true with respect to the rental car benefit. The declarations page simply sets forth its outside limit, not the terms under which it can be received.

In any event, the Policy Provision is conspicuous, plain and clear. We first discuss the conspicuousness of the Policy Provision. It is located exactly where it ought to be – under the subheading, "**Coverage F – Rental Car Benefit**," immediately following the paragraph describing the benefit. Anyone reading paragraph (a) under that heading, which sets forth the circumstances in which the rental car benefit will be provided, will logically continue to subparagraphs (1) and (2), which are indented immediately below it, and set forth the events which trigger and terminate such coverage. The Policy Provision is not placed on an overcrowded page, in a dense pack format, or hidden in fine print in a policy section bearing no relationship to the insuring clause. It is instead neatly indented in a subparagraph immediately following the insuring clause, which is itself clearly identified by a bold subheading. The Policy Provision is conspicuous. The fact that the Policy Provision is not included in the declarations page does not alter this result. The declarations page is a brief summary of the coverages, the limits of liability, and key exclusions.[9] It sets forth the maximum

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[9] Plaintiffs' declarations page also identifies, by name, an individual whose operation of a motor vehicle is not covered by the policy.

benefits available under all coverages and refers the insured to the policy itself to discover the terms of coverage. As the challenged limitation on coverage appears in the policy's terms of coverage for the rental car benefit, this reference is sufficient.[10]

The Policy Provision is also plain and clear. The key language is that "Reimbursement will be for the period . . . terminating on 12:01 A.M. on the day following the settlement offer." This provision is clearly stated, in words easily understandable by a layman. We therefore conclude the provision was conspicuous, plain, and clear. The trial court did not err in finding it so.

4. *The Policy is Not Ambiguous*

"A policy term is considered ambiguous when it is capable of two or more constructions, but only if both are reasonable." (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 455.) A policy provision "is ambiguous *only* if it is susceptible to two or more reasonable constructions despite the plain meaning of its terms within the context of the policy as a whole" (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) An expectation of coverage "cannot *create* an ambiguity; it is merely an interpretive tool used to resolve an ambiguity once it is found to exist." (*Fire Ins. Exchange v. Superior Court*, *supra*, 116 Cal.App.4th at pp. 456-457.)

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[10] Indeed, we would be hard pressed to envision a readable declarations page which included the Policy Provision in this case in the "Limits of Liability" section of the chart, which has room for but a half-line of text. If every limitation on coverage were required to be included on the declarations page, the declarations page would be swallowed whole by the policy.

Plaintiffs argue that Mercury's policy is ambiguous because the Declaration Provision is contradicted by the Policy Provision. As stated in plaintiffs' brief on appeal, they argue that it is "ambiguous to provide [30] days of rental coverage plainly on the [declarations] page, while at the same time inconspicuously limiting this coverage much later in the policy provisions handbook." We disagree with plaintiffs' characterization of the two provisions. The Declaration Provision does not "provide [30] days of rental coverage"; it provides a *limit* of 30 days of rental coverage *subject to the terms in the policy*. The policy itself then contains the Policy Provision (which we have already concluded to be conspicuous), which provides that such benefits terminate when a settlement offer is made. There is no ambiguity. Rental car benefits are paid from the date the loss is reported to the date a settlement offer is made, with a maximum benefit of 30 days.

As the Policy Provision is conspicuous, plain and clear, and the policy is unambiguous, the trial court did not err in concluding plaintiffs cannot assert a cause of action for breach of contract.

5. *Plaintiffs Have Not Pled Fraud With Particularity*

"In California, fraud must be pled with specificity; general and conclusory allegations do not suffice." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) A plaintiff must plead facts showing how, when, where, to whom, and by what means the representations were tendered. (*Ibid.*) "A plaintiff's burden in asserting a fraud claim against a corporate [defendant] is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representation, their

authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' " (*Ibid.*)

In this case, it is apparent that plaintiffs' allegations of fraud are woefully inadequate. The first amended complaint alleges only that "[d]efendants, and through their agents and employees including, but not limited to, Heather Enerva, and Harold Hanslmair, through oral representations, written correspondence and applications, and the [d]eclarations, represented to [p]laintiffs, [p]laintiff [c]lass and the general public that upon suffering a covered loss to their one's [*sic*] vehicle, 30 days of rental car benefits would be available to them." This allegation addresses, in the most cursory and conclusory manner, the elements of how, to whom and by what means the alleged misrepresentations were made. It wholly fails to address the elements of when, and where the representations were made. Although the complaint identifies Enerva and Hanslmair by name, it is also wholly inadequate in alleging their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. Plaintiffs' allegations of fraud are completely inadequate to support a cause of action.[11]

6. *Plaintiffs Cannot Establish Justifiable Reliance*

A plaintiff asserting a cause of action for fraud or negligent misrepresentation must prove that the plaintiff justifiably relied on the defendant's representation. (*Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, 1586.) Although the issue of justifiable reliance is a question of fact, there are circumstances in which it

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[11] Plaintiffs do not seek leave to amend to allege fraud with greater specificity.

can be decided as a matter of law. (*Ibid.*) It is unjustifiable as a matter of law to rely on an insurance agent's representations or promotional brochures when the policy itself is to the contrary. (*Id*. at pp. 1586-1587.) "Absent an ambiguity, ' . . . courts may not rewrite the insurance contract or force a conclusion to exact liability where none was contemplated.' [Citation.] . . . [A] court 'must hold the insured bound by clear and conspicuous provisions in the policy even if evidence suggests that the insured did not read or understand them.' The [insureds], having failed to read the policy and having accepted it without objection, cannot be heard to complain [when] it was not what they expected. Their reliance on representations about what they were getting for their money was unjustified as a matter of law." (*Id*. at p. 1589.)

While plaintiffs' first amended complaint takes a somewhat scattershot approach, alleging fraudulent misrepresentations were made orally, in written correspondence, in applications, and in policy declarations,[12] it is apparent that they cannot establish justifiable reliance on any such representations. We have determined that the insurance policy unambiguously provides for rental car benefits that terminate when a settlement offer is made. As such, plaintiffs were not justified, as a matter of law, in relying on any representation to the contrary. The causes of action for fraud and negligent misrepresentation cannot proceed.

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[12] The cause of action for negligent misrepresentation is, in contrast, based solely on the purported representation of 30 days of rental car coverage in the Declaration Provision.

DISPOSITION

The judgment is affirmed. Mercury shall recover its costs on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.